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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 373

HERBERT S. SCHWARTZMAN,
Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE AND OF HOW THE FEDERAL QUESTIONS ARE PRESENTED	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	12
APPENDIX:	
A—Opinion of New York Court of Appeals	1a
B—Judgment (Remittitur) of Court of Appeals (As Amended)	23a
C—Order of Court of Appeals Denying Rehearing and Amending Remittitur	26a
D—Statutes Involved—New York State Grand Larceny Provisions (Penal Law, §§ 1290, 1290a, 1294, 1295)	28a

Cases Cited

Boyd v. United States, 142 U. S. 450 (1892)	8, 9
Burgett v. Texas, 389 U. S. 109 (1967)	11
Carbo v. United States, 7 L. Ed. 2d 769, 82 S. Ct. 662 (1962)	10fn

PAGE

Gordon v. United States, 344 U. S. 414 ..... 10fn
Greer v. United States, 245 U. S. 559 9
Johnson v. United States, 318 U. S. 189 (1943) 9
Kelley v. United States, 393 U. S. 963 (1968) 10fn
Michelson v. United States, 335 U. S. 469 (1948) 10, 10fn
People v. Webster, 139 N. Y. 73 12
Simmons v. United States, 390 U. S. 377 10
Spencer v. Texas, 385 U. S. 554 (1967) 11
Walder v. United States, 347 U. S. 62 .....10, 10fn

United States Constitution Cited

Fourteenth Amendment 1-4, 8

Statutes Cited

28 U.S.C.:

Sec. 1257(3) 2

N. Y. Penal Law:

Secs. 1290, 1290a, 1294, 1295 4

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Herbert S. Schwartzman, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case March 6, 1969, re-argument denied April 24, 1969.

Opinion Below

The opinion of the Court of Appeals of the State of New York, printed as Appendix A hereto, *infra,* is reported in 24 N. Y. 2d 241, —— N. E. 2d ——. The Ap-

pellate Division of the Supreme Court of the State of New York did not write an opinion, nor did the trial Court (County Court of Nassau County, New York).

Jurisdiction

The judgment (remittitur) of the Court of Appeals of the State of New York was entered March 6, 1969 (Appendix B hereto, *infra*). On April 24, 1969 the Court of Appeals, by written order, denied on the merits a motion for re-argument (Appendix C hereto, *infra*).

Also on April 24, 1969 the Court of Appeals, by written order, granted a motion for amendment of the remittitur by adding thereto that there was presented and necessarily passed upon a question of fair trial and due process under the Fourteenth Amendment of the United States Constitution—details *infra* (Appendix C hereto, *infra*).

The judgment of the Court of Appeals here sought to be reviewed, affirmed a judgment of the Appellate Division, Second Department, Supreme Court of the State of New York which had affirmed without opinion ("Additional Papers To The Court of Appeals", pp. 3-4, filed as part of the Record herein), a judgment of the County Court of Nassau County, New York, convicting the within petitioner Schwartzman of grand larceny and sentencing him to imprisonment (R. 320-322*).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fourteenth Amendment due process).

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* "R. " refers to the printed "Record On Appeal" in the Court of Appeals.

(At the time this petition for certiorari is being delivered to the Clerk's office for filing (July 23, 1969), certain portions of the certified record are not yet available owing to unexpected difficulties. We are delivering together with this petition an application for a short extension of time in which to complete the filing of the certified record.)

Questions Presented

Petitioner was convicted in a New York State prosecution on one count of grand larceny by false pretenses. Testifying in his own behalf, he claimed the alleged victim had prior actual or constructive knowledge of the alleged false pretenses. The prosecutor was then permitted to cross-examine him about a large number of other alleged acts, unrelated to this case, implying that petitioner has a bent for financial unscrupulousness. The Court of Appeals of the State of New York split four to three in affirming the conviction, the dissenting Judges (Judge Burke, joined by the Chief Judge Fuld and Judge Keating) taking the view that the cross-examination had denied petitioner his "right to a fair and impartial trial", that the majority decision "encroaches on the well settled policy * * * that 'One may not be convicted of one crime on proof that he probably was guilty because he committed another crime' ", and that "the trial procedure employed below prevented the defendant from developing the truth". Petitioner argued these issues in the Courts below, throughout, on the basis of denial of Fourteenth Amendment due process, and the Court below in its amended remittitur declared that the Fourteenth Amendment issue had been presented by petitioner and decided against him. The questions are:

1. In the circumstances of this case is there presented a Fourteenth Amendment due process issue, deserving

certiorari consideration, of the fairness of existing doctrines allowing cross-examination of a criminal defendant on the basis of unrelated "other defenses"?

2. As here applied, have those existing doctrines (allowing cross-examination of the defendant as to unrelated "other offenses") resulted in a denial of Fourteenth Amendment due process?

3. In the "fundamental fairness" terms of the Fourteenth Amendment due process standards, and on the particular facts of this case, is it not necessary to evaluate the ultimate due process aggrievement here (the prejudicing of the jurors' minds against the defendant as a "bad man" on facts unrelated to the charge in issue), without regard to conventional distinctions between the prosecution's resort to "other offenses" on its direct case rather than on cross-examination of the defendant, and without regard to distinctions as to the niceties of prosecutive resort to such evidence to contradict the defendant's credibility instead of to prove his "intent", and without regard to like niceties of distinction based on concepts of "collateral impeachment" by "extrinsic evidence," etc. And if this case is evaluated in the manner just suggested, has there not occurred a denial of fair due process trial?

Constitutional Provisions and Statutes Involved

The case involves the due process clause of the Fourteenth Amendment of the United States Constitution. It also involves *N. Y. Penal Law* §§1290, 1290a, 1294, 1295, relating to grand larceny (i.e., the former Penal Law prior to the Revision which became effective September 1, 1967); these statutes are quoted in Appendix D hereto, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

Petitioner was convicted in the County Court of Nassau County, New York, in 1965 on one count of grand larceny in the first degree by false pretenses. The charge was that in September 1964 he had assigned to Mrs. Roslyn Gladstone an account receivable, representing that the account was unencumbered, when in fact he had assigned the same account about a month earlier to Lester Balagur as security for a loan. The account receivable was for merchandise furnished to the Police Department of the City of New York, billed at $1592, the account being assigned to Mrs. Gladstone for $1000 and having been previously assigned to Balagur to secure a loan of $1400.

At the trial Mrs. Gladstone testified for the prosecution (R. 19-64, 274-275). The defense cross-examination of Mrs. Gladstone revealed that she was a very experienced business-woman, especially in "factoring" business accounts (R. 28 *et seq.*), and that her husband, William B. Gladstone (a disbarred attorney—R. 183), had in effect totally arranged and managed the instant transaction between her and petitioner Schwartzman, and indeed that her husband practically had *carte blanche* in initiating and handling financial deals on her behalf in a sort of partnership activity of the spouses in matters of factoring and other money-lending (e.g., R. 37 *et seq.*).

Since petitioner Schwartzman did not dispute, but indeed unqualifiedly acknowledged, that he had signed a paper representing to Mrs. Gladstone that the account receivable in question was unencumbered,* and since peti-

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* It is undisputed that this paper was drawn up by Mrs. Gladstone's husband at petitioner Schwartzman's office in the absence of Mrs. Gladstone.

tioner also swore that Mrs. Gladstone's husband had full knowledge of the prior assignment to Balagur (R. 198-213), the central factual issue at the trial became, whether Mr. Gladstone had such prior knowledge. The defense called Mr. Gladstone as a witness, and he denied having had such prior knowledge, but we think we may say that he was far from being a strong or convincing witness on this disputed issue of fact (R. 150-187); among other items in the record casting doubt on Mr. Gladstone's veracity was that evidently he had said to Balagur, in the Courthouse corridor during this trial, "remember, we didn't know what each other was doing in this case" (R. 90—with which see R. 181-182).

In the setting of this diametrical conflict of testimony between petitioner Schwartzman and Mr. Gladstone on the issue of whether Gladstone had prior knowledge of the earlier assignment to Balagur, the prosecutor, in cross-examining petitioner Schwartzman, chose the tactic of an all-out flank attack on Schwartzman's testimony by a massive parading before the jury of unrelated alleged acts of Schwartzman involving bad checks, deceptive chattel mortgage transactions and the like (R. 222-269). Defense counsel repeatedly but unavailingly objected that this line of cross-examination as to other, unrelated bad acts (amounting to crime*) was prejudicial because it was bound to hurt the defendant with the jury to a degree fatally disproportionate with any relevant admissibility of such evidence on the issues of Schwartzman's credibility or intent (R. 232 *et seq.*, 241, 246, 263 *et seq.*, 314, 320). The Fourteenth Amendment due process basis of these defense objections was expressly preserved prior to the sentencing (R. 320).

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* Schwartzman, prior to this trial, had never been convicted of anything except traffic violations (R. 269).

Petitioner was sentenced to 2½ to 5 years (R. 322).

On appeal to the Appellate Division, Second Department, Supreme Court of the State of New York, the conviction was unanimously affirmed without opinion ("Additional Papers To The Court of Appeals" pp. 3-4). Petitioner's brief to the Appellate Division duly preserved the Fourteenth Amendment due process objection concerning the cross-examination as to other, unrelated bad acts or offenses.

Likewise on appeal to the Court of Appeals of the State of New York petitioner's brief preserved the Fourteenth Amendment contention. The Court of Appeals, by a vote of four to three, affirmed the conviction (Appendix A, hereto, *infra*). As noted in the prefatory paragraph of our Questions Presented, *supra*, the three dissenting Judges (Judge Burke, joined by Chief Judge Fuld and Judge Keating) formulated the issue in terms of basic trial fairness (*ibid*). By an order amending the remittitur, the Court of Appeals further ruled:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Defendant contended that the District Attorney's cross-examination of him and admission of evidence of uncharged crimes denied defendant a fair trial and due process of law in violation of his rights under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals considered this question and held that defendant's constitutional rights were not violated."

Certain refinements in the reasoning of the majority and dissenting Judges of the Court of Appeals are noted in appropriate connections under our "Reasons", *infra*.

Reasons for Granting the Writ

We realize that, at the level of the discretionary certiorari jurisdiction of this Court, a party invoking that jurisdiction for review of a State Court decision on the question of the fairness of admitting evidence or of allowing interrogation concerning unrelated "other offenses" in a criminal trial, faces the threshhold problem of whether this poses a Fourteenth Amendment due process issue at all (see authorities *infra*). But, when three Judges of the deservedly prestigious Court of Appeals of the State of New York, who are of such diverse propensity of judicial philosophy as are the herein dissenting Judges (Chief Judge Fuld, Judge Burke and Judge Keating), join in denouncing the cross-examination as to unrelated "other offenses" in this case on grounds of denial of the "right to a fair and impartial trial", etc. (Appendix A hereto, *infra*), a party may feel emboldened to ask this Court to accept the case on certiorari as presenting a Fourteenth Amendment due process issue.

It is true that in the reasoning of the majority and dissenting opinions below much intricacy of attention is devoted to some of the conventional techniques of the "other offenses" proof procedures from the standpoint of the law of evidence and not only from the standpoint of basic trial fairness in a constitutional orientation. However, we respectfully do not think that the decision below can be spared from certiorari review solely on the theory that it rests upon "an adequate state ground" and hence involves no "substantial federal question".

In the Reports of the decisions of this Court, the earliest importantly relevant devision on the "other offenses" problem seems to be *Boyd* v. *United States,* 142 U. S. 450 (1892), where the Court said that proof of certain rob-

beries committed by the defendants just one month before the offense (murder) on which they were being tried, "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged." The *Boyd* decision was written by the first Mr. Justice Harlan, for the unanimous Court.

In 1918, in *Greer* v. *United States,* 245 U. S. 559, 560-561, Mr. Justice Holmes (Mr. Justice McKenna dissenting) rejected for the Court the idea that there is a presumption of good character of a defendant in a criminal case, but *Greer* noted that the problem of impeachment of character testimony in a criminal case must be distinguished from the problem of safeguarding the "presumption of innocence" of the defendant against proofs of bad character or unrelated other offenses.

In *Johnson* v. *United States,* 318 U. S. 189, 195 (1943) the Court, referring to *Boyd, supra* (where the defendants apparently did not take the stand), said, on a variant aspect of the "other offenses" problem (the defendant in *Johnson* having invoked the privilege against self-incrimination during his own testimony on the stand), that "The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying * * * are of course vastly different". Our petitioner Schwartzman herein did not invoke the privilege against self-incrimination during his trial testimony; it is his con-

tention rather that the prosecution went too far in clubbing him with unrelated "other offenses" during the cross-examination.

In *Michelson* v. *United States,* 335 U. S. 469 (1948) the Court dealt with the problem of bringing unrelated "other offenses" to the jury's attention through cross-examination of defense character witnesses, and the Court declined to disturb established evidentiary doctrines in that regard even though serious analytical imperfections were acknowledged. In our case Schwartzman did not put his "character" in issue, all that he did was to put his defense theory in issue, the theory that the husband-business partner of the alleged false-pretenses victim in this case had actual prior knowledge of the earlier assignment of the account receivable, and that by fair inference the alleged victim herself (the wife) had constructive or vicariously binding knowledge *per* her husband's knowledge. To have permitted attack against this defense by allowing the prosecution to bring in a prejudicial mass of unrelated "other offenses" facts is analogously reminiscent of the unfair thwartings of legitimate defense opportunity which were condemned in *Walder* v. *United States,* 347 U. S. 62 and *Simmons* v. *United States,* 390 U. S. 377.*

**Michelson, supra,* was referred to, in connections not necessary to be elaborated here, in *Gordon* v. *United States,* 344 U.S. 414, 420n. and in *Walder, supra,* at 347 U.S. 65. See also Mr. Justice Douglas' reference to *Michelson* in his Opinion In Chambers (on aplication for bail) in *Carbo* v. *United States,* 7 L. Ed. 2d 769, 772, 82 S. Ct. 662, (1962). See also Chief Justice Warren's dissent on the denial of certiorari in *Kelley* v. *United States,* 393 U.S. 963, 966 (1968). Both Mr. Justice Douglas and Chief Justice Warren, in the respective decisions just cited, emphasized the Court's expressions in *Michelson* which voiced concern over the unfairness that may be latent in some uses of the "other offenses" principle.

But perhaps of foremost interest here are *Spencer* v. *Texas,* 385 U. S. 554 (1967), and *Burgett* v. *Texas,* 389 U. S. 109 (1967), involving State recidivist punishment provisions where the respective several opinons recognized a new vitality in the question of the applicability of Fourteenth Amendment due process to the "other offenses" problem in State criminal prosecutions.

We have suggested in our Questions Presented, *supra* (especially Question 3), that our herein tendered due process isue concerning "other offenses" evidence needs to be evaluated without regard to the various highly technicalized and formulary distinctions of the past—such distinctions as that of whether the defendant takes the stand or not, or of whether the "other offenses" proofs go in during the prosecutions direct case rather than during cross-examination of the defendant, or of whether the "other offenses" proofs go in through cross-examination of defense character witnesses rather than through cross-examination of the defendant himself, or of whether the occasion for admitting the "other offenses" proofs is impeachment of the defendant's credibility rather than an effort to prove his "intent" by a pattern of conduct", or of whether the "other offenses" proofs are improperly introduced *via* "extrinsic evidence" on a "collateral" issue, etc. The majority and dissenting opinions of the Court below extensively discuss these conventional technicalities, but we think that the ultimately meaningful due process issue here trancends all of those technicalities of the law of evidence. Perhaps the single most unrealistic (and unfair in due process terms) feature of the conventional doctrinal-evidentiary thinking in this area, as especially instanced in the present case, is the concept that a defendant who takes the stand in a criminal trial is just another "witness" who (under the law of New York) opens himself

to interrogation as to any "immoral, vicious, or criminal acts which have a bearing on his credibility" (Appendix A hereto, *infra*, p. 6a citing *People* v. *Webster*, 139 N. Y. 73). Can it really be seriously maintained that an evidentiary rule for impeachment of "witnesses" deserves unvarying (uncritical is the better word) aplication *for any purpose* in a criminal trial (State or Federal) when the "witness" happens to be the defendant himself in his trial for crime?

If ever there was a cryingly needful occasion for this Court to interpose its corrective hand in a case of severe due process injustice that is sought to be excused by formalistic and ratiocinational "application" of principles of "the law of evidence", it is this case.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of New York Court of Appeals

PEOPLE *v.* SCHWARTZMAN [24 N Y 2d 241]

Statement of Case

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* HERBERT S. SCHWARTZMAN, Appellant.

Argued November 25, 1968; decided March 6, 1969.

Crimes—evidence—on trial of defendant for selling account receivable that had been previously assigned, cross-examination of defendant as to other criminal acts was relevant to impeach defendant's credibility and court's permitting same was proper exercise of discretion—documents as to five transactions, all but one being admitted, were used; use of documents as to disputed transaction during cross-examination was not improper impeachment on collateral matter since documents were independently admissible on issue of defendant's intention to defraud—permitting evidence of intention to defraud, not on main case, but on cross-examination, was proper exercise of discretion—error to cross-examine defendant as to crime of which he had been acquitted but error was harmless—no exception having been taken to Judge's comment on defendant's right to appeal, alleged error was not saved for review.

1. Defendant, as president of a corporation, was charged with selling an account receivable of the corporation, representing that the receivable was unencumbered when ac-

tually it had been previously assigned. Defendant testified in his own behalf that the purchaser's husband acted as her agent and knew of the prior assignment. Defendant was cross-examined as to instances of misconduct involving the issuing of numerous worthless checks, repeated mortgaging of an automobile which he did not own, sale of mortgaged property upon the representation that the property was unencumbered, wrongfully retaining money received as agent in the sale of an automobile, and refusal to return or pay for a valuable ring received from a jeweler on approval. All these transactions were relevant to impeach his credibility as a witness and the inquiry into them was allowed as a proper exercise of the trial court's discretion.

2. Defendant admitted the transaction for which he was indicted but his intention to defraud was in dispute. Documentary evidence was used in cross-examination as to five transactions. Defendant admitted all but one of them—a chattel mortgage of a Cadillac to a named person. As to this one transaction, the use of the copy and original of the chattel mortgage during cross-examination did not constitute improper impeachment on a collateral matter since the documents not only impeached defendant's credibility, but were also independently admissible on the essential issue of defendant's intention to defraud in the crime charged. The jury was therefore properly instructed that they could give this evidence its logical probative weight on the issues of defendant's credibility and intention.

3. While procedural orderliness requires a party to adduce all his proof during his direct case, here the People

were confronted with defendant's explanation that the assignee's husband knew of the prior assignment and it was within the discretion of the court to permit the use of documentary evidence relevant to defendant's intention to defraud during cross-examination.

4. It was error for the People to cross-examine defendant with respect to a crime of which defendant had been acquitted. One answer was involved and could not have influenced the result in view of the strong evidence of defendant's guilt. The error was harmless (Code Crim. Pro., § 542).

5. Where defendant made no objection or exception to the Judge's comment upon his right to appeal, and made no request to charge differently, the alleged error was not saved for review.

People v. *Schwartzman*, 30 A D 2d 917, affirmed.

APPEAL, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 8, 1968, affirming a judgment of the County Court of Nassau County (MARTIN M. KOLBRENER, J.), rendered upon a verdict convicting defendant of grand larceny in the first degree.

John Joseph Sutter for appellant. I. The cross-examination of defendant by the court and prosecutor exceeded all permissible limitations and denied him both a fair trial and due process of law. (*People* v. *Webster*, 139 N. Y. 73; *People* v. *Sorge*, 301 N. Y. 198; *People* v. *Moore*, 20 A. D. 2d 817; *People* v. *Jones*, 297 N. Y. 459; *People* v.

Brown, 284 N. Y. 753; *People* v. *Johnston*, 228 N. Y. 332; *People* v. *McCormick*, 303 N. Y. 403; *People* v. *Duncan*, 13 N Y 2d 37; *People* v. *Russell*, 266 N. Y. 147; *People* v. *Zackowitz*, 254 N. Y. 192.) II. The cross-examination of defendant on a crime for which he had been acquitted is prejudicial per se. (*People* v. *Santiago*, 15 N. Y 2d 640.) III. The cross-examination of defendant by the court was of such a nature as to indicate communicable disbelief of defendant. (*People* v. *Ohanian*, 245 N. Y. 227; *People* v. *Knapper*, 230 App. Div. 487; *People* v. *Mendes*, 3 N Y 2d 120; *People* v. *Perry*, 277 N. Y. 460; *People* v. *Farrell*, 7 A D 2d 642; *People* v. *Montanaro*, 272 App. Div. 834; *People* v. *Adler*, 274 App. Div. 820.) IV. The court's charge to the jury concerning the purpose of receiving in evidence proof of other illegal activities was clearly erroneous. (*People* v. *Molineux*, 168 N. Y. 264; *Mayer* v. *People*, 80 N. Y. 364; *People* v. *Katz*, 209 N. Y. 311; *People* v. *De Garmo*, 179 N. Y. 130; *People* v. *Marino*, 271 N. Y. 317; *People* v. *Doty*, 175 N. Y. 164; *People* v. *Malkin*, 250 N. Y. 185.) V. The court's charge to the jury concerning defendant's right to appeal is prejudicial vitiates the trial and is a denial of the constitutionally secured right to a trial by jury in a felony prosecution. (*People* v. *Johnson*, 284 N. Y. 182; *People* v. *Lynch*, 284 N. Y. 239; *People* v. *Sherwood*, 271 N. Y. 427; *People* v. *Esposito*, 224 N. Y. 370; *United States* v. *Fiorito*, 300 F. 2d 424; *People* v. *Silverman*, 252 App. Div. 149; *Duncan* v. *Louisiana*, 391 U. S. 145; *People* v. *Bradner*, 107 N. Y. 1; *Cancemi* v. *People*, 18 N. Y. 128; *People* v. *Miles*, 289 N. Y. 360.) VI. The totality of the trial coupled with the cumulative effect of prejudicial errors was such as to deny defendant a fair trial and due process of law. (*People* v. *Becker*, 210 N. Y. 274; *People*

v. *Wolf*, 183 N. Y. 464; *People* v. *Savvides*, 1 N Y 2d 554; *People* v. *Bai*, 7 N Y 2d 152; *People* v. *Mleczko*, 298 N. Y. 153; *People* v. *Rosenfeld*, 11 N Y 2d 290; *People* v. *Jackson*, 7 N Y 2d 142; *People* v. *Marendi*, 213 N. Y. 600.)

William Cahn, District Attorney (Henry P. De Vine of counsel), for respondent. I. The trial was fair, (*La Beau* v. *People*, 34 N. Y. 223; *People* v. *Ramistella*, 306 N. Y. 379; *Matter of Friedel* v. *Board of Regents of State of N. Y.*, 296 N. Y. 347; *People* v. *Malkin*, 250 N. Y. 185; *People* v. *Sorge*, 301 N. Y. 198; *People* v. *Buchalter*, 289 N. Y. 181; *People* v. *Santiago*, 15 N Y 2d 640; *People* v. *Tait*, 234 App. Div. 433, 259 N. Y. 599; *Sims* v. *Sims*, 75 N. Y. 466.) II. The charge was not prejudicial. (*People* v. *McQueen*, 18 N Y 2d 337.)

JASEN, J. This appeal presents a question involving the nature and extent of permissible cross-examination of a criminal defendant concerning crimes which are not charged in the indictment.

Defendant was the president of Safety Circuit Corporation which appears to have been in financial difficulty in 1964. Roslyn Gladstone purchased an account receivable of the corporation from defendant on September 25, 1964 for $1,000. Defendant signed a letter to Mrs. Gladstone representing that the receivable was unencumbered. Actually, defendant had previously assigned this account receivable to one Lester Balagur as security for a loan and Mrs. Gladstone was consequently unable to collect it. Defendant admitted during his direct testimony at trial that the account had been assigned twice. His only defense was that Mrs. Gladstone's husband acted as her agent and knew of the prior assignment. Mr. Gladstone testified

for the defense, but denied that he knew of the prior assignment. Defendant was convicted after trial by jury of grand larceny in the first degree and sentenced to imprisonment for 2½ to 5 years. The Appellate Division unanimously affirmed.

On appeal defendant contends that he was denied a fair trial because he was improperly cross-examined concerning other criminal acts. The record discloses that the cross-examination of defendant was extensive, and that the District Attorney attempted to impeach his credibility by inquiry into some 22 alleged similar instances of misconduct. The allegations of defendant's other misconduct involved numerous worthless checks, repeated mortgaging of a car which he did not own, sale of mortgaged property upon the misrepresentation that the property was unencumbered, wrongfully retaining money received as agent in the sale of a car, and refusal to return or pay for a valuable ring received from a jeweler on approval.

The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge (*Langley* v. *Wadsworth,* 99 N. Y. 61, 63.) It is well settled that a defendant who chooses to testify may be cross-examined concerning any immoral, vicious, or criminal acts which have a bearing on his credibility as a witness. (*People* v. *Webster,* 139 N. Y. 73; Richardson, Evidence [9th ed.], § 510.) The offenses inquired into on cross-examination to impeach credibility need not be similar to the crime charged, and questions are not rendered improper merely because of their number provided they have some basis in fact and are asked in good faith. (*People* v. *Sorge,* 301 N. Y. 198, 200; *People* v. *Alamo,* 23 N Y 2d 630.) Nor

does a negative response by a defendant preclude further inquiry by the prosecutor in a legitimate effort to cause the defendant to change his testimony. Otherwise, a "witness would have it within his power to render futile most cross-examination." (*People* v. *Sorge, supra,* p. 201.)

All of the transactions concerning which defendant was cross-examined involve allegations of obtaining money by worthless checks or by other false representations and were, therefore, relevant to impeach his credibility as a witness. The inquiry into these transactions to impeach defendant's credibility therefore, was within the range of the trial court's discretion.[1] (*People* v. *Sorge, supra,* pp. 201-202; *People* v. *Casey,* 72 N. Y. 393, 398-399.)

In addition to cross-examining the defendant as to these numerous previous criminal acts, the District Attorney also used documentary evidence to assist his examination. The use of this documentary evidence during cross-examination, the defendant maintains, constitutes impermissible use of extrinsic evidence on collateral matters.

The general rule is that a cross-examiner cannot *contradict* a witness' answers concerning collateral matters by producing extrinsic evidence for the *sole purpose* of impeaching credibility. (*People* v. *Sorge, supra,* p. 201; *People* v. *McCormick,* 303 N. Y. 403; *People* v. *Duncan,* 13 N Y 2d 37; *People* v. *Perry,* 277 N. Y. 460; *People* v. *Malkin,* 250 N. Y. 185; Richardson, evidence, *supra,* §§ 503, 510.) However, an exception to this rule exists where the

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[1]With the exception of one transaction involving a check issued to one Charles Mendell concerning which defendant was tried and acquitted prior to the instant trial. This incident is discussed at pages — and — of this opinion.

evidence sought to be introduced is relevant to some issue in the case *other than* credibility or if independently admissible to impeach the witness. (3 Wigmore, Evidence [3d ed.], §§ 1003, 1004, 1021; CPLR 4513; *State* v. *Gilmore,* 42 Wn. 2d 624 [1953]; *People* v. *Clark,* 63 Cal. 2d 503, 505; *Hanover Ins. Co.* v. *Johnson,* 397 S. W. 2d 904 [Texas, 1965]; *Commonwealth* v. *Heller,* 369 Pa. 457, 463 [evidence of other offenses tending to prove motive can be used to contradict a defendant's answers on cross-examination]; 3 Wharton's Criminal Evidence [11th ed., 1935], § 1293; 98 C. J. S., Witnesses, § 633; cf. *Attorney-General* v. *Hitchcock,* 1 Exch. 91, 99; cf. Richardson, Evidence, *supra,* § 503; cf. comment, Use of Bad Character and Prior Convictions to Impeach a Defendant-Witness, 34 Fordham L. Rev. 107, 111-112 [1965]; cf. *United States* v. *Herr,* 338 F. 2d 607, 611 [7th Cir., 1964], cert. den. 382 U. S. 999.) The reason for this exception to the collateral evidence rule is evident from the policy considerations underlying the general rule. The collateral evidence rule is said to rest upon auxiliary policy considerations of preventing undue confusion of issues and unfair surprise by extrinsic testimony. (3 Wigmore, *supra,* §§ 979, 1002.) Also, testimonial errors concerning distant and unconnected points are of inferior probative value.

However, the objection of confusion of issues is inapplicable if the evidence sought to be introduced is admissible for any purpose other than contradiction. Likewise, it is not unfair to expect a party to refute testimonial errors when the subject of the error is a material issue in the case, for upon such subjects the parties should in any event come prepared. Therefore, the policy objections to the contradiction of a witness' answers are inap-

plicable if evidence of the fact contradicted would be admissble for any purpose independent of the contradiction. It follows that a fact is not a collateral matter if it could be shown in evidence for any purpose independent of the contradiction. (*State* v. *Gilmore, supra; People* v. *Clark, supra; United States* v. *Herr, supra;* 3 Wigmore, *supra,* §§ 1003, 1004, 1021.)

Thus, when a witness testifies concerning a fact material to the case, he may be contradicted either by cross-examination or by introduction of other evidence. (*Wells* v. *Kelsey,* 37 N. Y. 143; *Hynes* v. *McDermott,* 82 N Y. 42, 52; *Becker* v. *Koch,* 104 N. Y. 394; *Carlisle* v. *Norris,* 215 N. Y. 400, 410; 1 Mottla, New York Evidence, Proof of Cases, [2d ed., 1966], § 431; 3 Wigmore, *supra,* §§ 1003, 1004, 1021; 3 Wharton's Criminal Evidence, *supra,* § 1293; 98 C. J. S., Witness, *supra,* § 633; *People* v. *Gilmore, supra; People* v. *Clark, supra.*) Also, evidence of other crimes has long been held admissible to establish the motive or intention of a defendant. (*People* v. *Molineux,* 168 N. Y. 264; *People* v. *Dales,* 309 N. Y. 97.) It follows that where intention to defraud is an essential element of the crime charged, such as here, evidence competent to establish criminal intention is not a collateral matter with respect to cross-examination. (*State* v. *Gilmore, supra; People* v. *Clark, supra;* 3 Wigmore, *supra,* §§ 1003, 1004, 1021; *Commonwealth* v. *Heller, supra.*)

The issue, therefore, narrows to whether defendant's answers on cross-examination were contradicted, and, if so, whether the evidence used to impeach his answers was admissable for any purpose independent of the contradiction.

Nine documents relating to seven distinct transactions were utilized in the cross-examination of defendant. De-

fense counsel did not object to the use of two memoranda relating to defendant's refusal to return or pay for a valuable ring which he received from a jeweler on approval. Documents relating to an assignment of letters patent were also used. Defendant admitted the transaction, but the trial court halted the cross-examination concerning this transaction because the prosecution had failed to prove any wrongdoing.

The transactions to which defendant objected to the use of documentary evidence during cross-examination are five—three instances of defendant's mortgaging a 1962 Cadillac which he did not own and two examples of passing worthless checks. However, a close examination of the record reveals that defendant admitted all but one transaction during cross-examination—that of a chattel mortgage of a 1962 Cadillac to one Florence Goldfarb. Concerning this one transaction, defendant first admitted during cross-examination that he gave the chattel mortgage, and defense counsel stipulated that defendant received $4,000 from Florence Goldfarb for the chattel mortgage when in fact he did not own the car. Defendant then repudiated his counsel's stipulation, stating that he did not obtain $4,000 from Florence Goldfarb, but that the chattel mortgage was to Hy Gold or Hy Goldfarb. At this juncture, defendant basically admitted the transaction, but questioned the identity of the mortgagee. His answers, however, were highly evasive and the prosecutor handed him a copy of the chattel mortgage. Defendant then admitted that the signature on the mortgage was similar to his own, but denied signing the exhibit. He was shown the original chattel mortgage at the conclusion of his cross-examination, but also denied signing the original document.

As to this one transaction which defendant denied, we conclude that the use of a copy and the original of the chattel mortgage during cross-examination does not constitute improper impeachment on a collateral matter since the documents not only impeached defendant's credibility, but were also *independently* admissible on the essential issue of defendant's intention to defraud in the crime charged.

The rules governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof and the danger of prejudice which it presents to an accused. When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded. "Where, however, it is relevant to negative the existence of accident or mistake, or to show the intent or motive with which the defendant acted, or a common scheme or plan, its probative value is deemed to outweigh the danger of prejudice, and the rules dictating exclusion will yield." (*People* v. *Dales, supra,* p. 101; see also, *People* v. *Molineux, supra,* pp. 291-294; *People* v. *Gaffey,* 182 N. Y. 257; 2 *Wigmore, supra,* §§ 300-307; McCormick, Evidence [1954], § 157.) Evidence of other similar crimes is particularly appropriate where, as in the instant case, the defendant is charged with larceny by false pretenses. (*People* v. *Molineux, supra,* pp. 297-299; *People* v. *Peckens,* 153 N. Y. 576; *Mayer* v. *People,* 80 N. Y. 364.)

In this case defendant admitted obtaining $1,000 from Mrs. Gladstone by assigning an encumbered account receivable to her. Since he admitted the transaction, his intention is the only fact in dispute. However, the acts

involved in assigning the receivable are equivocal, and the underlying intention is not easily inferred from the acts alone. Thus evidence of successive similar misrepresentations by defendant is crucial in attempting to ascertain defendant's intention concerning the crime at bar. (See, e.g., *People* v. *Dales, supra,* p. 101; *People* v. *Molineux, supra,* pp. 297-299; *People* v. *Peckens, supra; Mayer* v. *People, supra.*) In such cases it is recognized that "proof of intent is often unobtainable except by evidence of successive repetitions of the act." (*People* v. *Molineux, supra,* p. 298.)

Analytically, the problem is one of the similarity of the other misconduct with the crime charged. (*People* v. *Dales, supra,* p. 101; *People* v. *Molineux, supra;* 2 Wigmore, *supra,* § 302; Richardson, *supra,* § 182.) To quote from Professor Wigmore, "Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance." (2 Wigmore, *supra,* § 302, p. 200.)

Here, the evidence of defendant's other misrepresentations is highly relevant on the issue of his intention to defraud in the crime charged and discloses a pattern of obtaining money by false pretenses over a two-year period prior to the crime charged. (Fisch, New York Evidence [1959], § 217; *People* v. *Goldstein,* 295 N. Y. 61, 65; *People* v. *Dales, supra; People* v. *Thompson,* 212 N. Y. 249; *People* v. *Shulman,* 80 N. Y. 373n., 376n. [76 N. Y. 624]; cf. *People* v. *Peckens, supra;* cf. *People* v. *Warder,* 231 App. Div. 215.) There can be no doubt, then, that evidence that defendant mortgaged a 1962 Cadillac which he did not own had an important bearing on the vital issue

of whether the defendant assigned the account receivable with intent to defraud. Accordingly, evidence of this chattel mortgage was admissible on the issue of defendant's intention in respect to the crime charged, and contradiction of defendant's answers concerning this mortgage, therefore, was not a collateral matter.

We conclude, therefore, that the cross-examination of defendant and the introduction of documentary evidence concerning these other crimes was proper.[2] This evidence was relevant to the crucial issue of defendant's intention to defraud, as well as to his credibility. It follows that

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[2] Although the Trial Judge initially stated that use of documentary evidence during cross-examination of defendant was admissible to impeach his credibility, the court subsequently ruled during the same cross-examination that this evidence was also admissible on the issue of defendant's intention in the crime charged. The People established a sufficient relationship between the crime charged and the alleged other criminal acts to justify admission of this evidence of other crimes on the issue of defendant's intention. Defendant was then presented on redirect examination with the opportunity to rebut all alleged instances of his other misconduct and to establish any purported lack of relationship between the alleged misconduct and the crime charged. The record does not support the dissenters' contention that defense counsel was prevented from exploring the relationship between the alleged other misconduct and the crime charged during redirect examination. To the contrary, defense counsel was afforded wide latitude in asking defendant specific questions on redirect examination to show the circumstances of his other alleged misconduct. The lack of factual support in the record for the dissenters' position is shown by the fact that defendant has not even argued in this court that he was prevented from establishing any purported lack of relationship between the other alleged misconduct and the crime charged because of the trial court's rulings during his redirect examination.

the jury was properly instructed that they could give this evidence its logical probative weight on the issues of defendant's credibility and intention.

We note that procedural orderliness generally mandates that a party adduce all its proof during its direct case (6 Wigmore, *supra*, § 1873.) This would have been the better practice in the instant case. (Cf. 2 Wigmore, *supra*, § 307.) However, the trial court has broad discretion over the nature and extent of cross-examination (*Langley* v. *Wadsworth*, 99 N. Y. 61, *supra*), including the right to vary the prescribed order of the trial and the normal order of proof. (Code Crim. Pro., § 388; cf. *People* v. *Koerner*, 154 N. Y. 355, 367-369; cf. *People* v. *Seiler*, 246 N. Y. 262.)

Here, the People established a prima facie case of defendant's intention to defraud by evidence that he assigned the same account receivable twice while representing to the second purchaser that the account was free and clear. In defense, the defendant testified that the second assignee (complainant) was chargeable with knowledge that the receivable had been previously assigned. Both the second assignee and her husband denied knowledge of the prior assignment. At this juncture, the People were confronted with a novel and unexpected explanation. The use of documentary evidence relevant to defendant's intention to defraud during cross-examination was within the sound discretion of the trial court under these circumstances. (*Langley* v. *Wadsworth, supra; People* v. *Koerner, supra.*)

The court did, however, permit one clear error. It is settled that reversible error is committed when a prosecutor *with knowledge* of an acquittal cross-examines a defendant concerning the criminal charge on which he has

been acquitted. (*People* v. *Santiago,* 15 N Y 2d 640.) This is in keeping with the general rule that knowing use of false evidence or allowing it to remain uncorrected denies due process. (*People* v. *Savvides,* 1 N Y 2d 554; cf. *Napue* v. *Illinois,* 360 U. S. 264, 269.)

The record discloses that defendant was asked near the close of his lengthy cross-examination about a $100 check which he issued to one Charles Mendell in 1964. Defendant replied, "The Judge threw that out in the courtroom." His attorney's request for a mistrial was denied.

The back of the information pertaining to the Mendell check indicates that the charge was tried in the Nassau County District Court and dismissed at the close of the prosecution's case on February 25, 1965. This dismissal is tantamount to acquittal of the charge after trial, and the cross-examination of defendant concerning this check was, therefore, error. (*People* v. *Cascone,* 185 N. Y. 317, 334; *People* v. *Santiago, supra.*)

Our decision in *Santiago* (*supra*) is inapposite, however, as here the record discloses that the District Attorney questioned defendant in good faith and in ignorance of his acquittal of the charge involving the Mendell check. Specifically, the District Attorney demonstrated his good faith at trial by showing that "print record" which he had before him was complete to June 4, 1965 and showed that defendant had not been tried since 1963. Defendant's February, 1965 acquittal of the Mendell check charge did not appear on the District Attorney's record. We note that defendant's counsel and the Trial Judge both remarked that they were not accusing the District Attorney of bad faith in regard to the Mendell check.

Logically, the inference the jury might draw from this error was that defendant had been charged concerning the Mendell check and had been acquitted. Certainly, this one answer in itself cannot have influenced the result in this case in view of the strong evidence of defendant's guilt and the proper cross-examination of defendant concerning 21 other similar fraudulent transactions and worthless checks which were more damaging to his credibility. Under these circumstances, the error is harmless beyond a reasonable doubt. (Code Crim. Pro., § 542; see, e.g., *People* v. *Kingston*, 8 N Y 2d 384; *Chapman* v. *California*, 386 U. S. 18; *Fahy* v. *Connecticut*, 375 U. S. 85.)

Finally, defendant contends that the trial court committed reversible error by commenting upon his right to appeal his conviction. However, there was no objection or exception to that part of the charge and no request was made to charge differently. This alleged error, therefore, is nonreviewable. (Code Crim. Pro., § 420-a; *People* v. *Simons*, 22 N Y 2d 533, 541; *People* v. *Feld*, 305 N. Y. 322, 332.)

Accordingly, the judgment of conviction should be affirmed.

Burke, J. (dissenting). The record before us in this case discloses incidents at the trial which I regard as so prejudicial to the defendant-appellant's rights as to require a reversal of the judgment of conviction and a new trial.

Herbert Schwartzman stands convicted upon an indictment which charged that, on September 24, 1964, he sold to a Mrs. Gladstone certain accounts receivable of the Safety Circuit Corporation "with the intent to deprive

and defraud" her by use of false and fraudulent misrepresentations. He was convicted of larceny in the first degree. At that trial, defendant testified in his own behalf and stated that, when he sold these accounts receivable valued at $1,592 to Mrs. Gladstone for $1,000, she had knowledge of the prior assignment of these accounts.

After testifying in this limited manner, defendant was subjected to an extensive cross-examination. At this time, the prosecutor introduced, over objection, documentary evidence which related to prior bad acts, allegedly committed by the defendant. Defendant contends that this documentary evidence was inadmissible when introduced and that the court's failure to prohibit the admission initially and its refusal to give a proper charge on the evidence at the conclusion of the trial constitute adequate and independent grounds for a reversal in this case.

It is, of course, undisputed that a witness' answers concerning collateral matters cannot be contradicted by the use of extrinsic evidence. It is equally established that documentary evidence is admissible when it relates to a fact material to the prosecution. To this extent, I am in full accord with the majority opinion (pp. 243-246). Until today, it had also been firmly settled that the law drew a distinction between impeaching the credibility of a witness by documentary evidence and establishing an essential element of a crime by the same means. (See, e.g., *People* v. *Malkin*, 250 N. Y. 185, 201.) While the law recognizes such distinctions, courts have been quick to acknowledge that "juries often disregard such distinctions" (250 N. Y., p. 201, *supra*). Nevertheless, the rule had always been that, where evidence is competent when

introduced for one purpose and incompetent for another, it is not rendered inadmissible, but will be permitted for the sole purpose for which it is competent. (See, e.g., Richardson, Evidence [9th ed.], § 6; Fisch, New York Evidence [1959], § 16.) Indeed, in analogous situations to the case at bar, it has been continually held that evidence of similar misdeeds is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition. (*United States* v. *Deaton*, 381 F. 2d 114 [2d Cir.]; *United States* v. *Knohl*, 379 F. 2d 427, 439 [2d Cir.]; see, also, *People* v. *Adams*, 21 N Y 2d 397.) In the latter case, this court concluded, in an opinion by Judge Scileppi, that, although the evidence was technically admissible for a limited purpose, the summation of the District Attorney was such as to vitiate whatever protection cautionary instructions would afford.

As I read the majority's opinion, it is their contention that, since the introduction of this documentary evidence might have been relevant to the crucial issue of intent, it thereby became relevant for purposes of impeaching the defendant's credibility (p. 249). Such a conclusion goes far beyond prior decisions of this court and indeed encroaches upon the well-settled policy of this State that "One may not be convicted of one crime on proof that he probably is guilty because he committed another crime". (*People* v. *Goldstein*, 295 N. Y. 61, 64.) While the majority indisputably possesses the power to change this entrenched and well-reasoned rule, I find that, in their attempt to justify the admissibility of prejudicial evidence in this way, they have seized upon a premise which is in itself defective. I refer to their conclusion that this docu-

mentary evidence was relevant—as admitted—to the crucial issue of intent.

While I do not disagree with the majority that evidence of other prior misdeeds is admissible where intent is in issue (*People* v. *Molineux,* 168 N. Y. 264), I cannot ignore the significant limitation which has been imposed by numerous jurisdictions, including New York, that this evidence must refer to events which have reference to the specific charge by reason of the proximity of time, place and circumstance. (*People* v. *Molineux,* 168 N. Y., *supra,* p. 300; see, also, *Patterson* v. *United States,* 361 F. 2d 632 [8th Cir.]; *United States* v. *Kirkpatrick,* 361 F. 2d 866 [6th Cir.]; *United States* v. *D'Antonio,* 362 F. 2d 151 [7th Cir.]; *Reed* v. *United States,* 364 F. 2d 630 [9th Cir.]; *Pardo* v. *United States,* 369 F. 2d 922 [5th Cir.]; *Boggs* v. *State,* 268 Ala. 358; *Dorsey* v. *State,* 25 Ariz. 139; *Stone* v. *State,* 162 Ark. 154; Richardson, Evidence [9th ed.], §§177, 182; Fisch, New York Evidence [1959], § 217; Ann., Evidence—Similar False Pretenses, 78 TALR 2d 1359, 1365-1367, § 2, subd. [b], and cases cited therein.)

In the instant case, each time the defendant's attorney objected to the introduction of the documents referred to by the majority, the trial court overruled him, commenting (incorrectly) that the documents were admissible to impeach the defendant's credibility. The following colloquy, concerning a chattel mortgage executed on June 21, 1962 and given to the Franklin National Bank, is illustrative of similar rulings at trial:

> "Mr. Guiney [prosecutor]: I offer it [a copy of the chattel mortgage] in evidence at this time, your Honor.

"The Court: Show it to Mr. Sutter [defendant's trial counsel].

"Mr. Sutter: I object to the introduction of the proposed exhibit on the basis, number one, it is an incomplete document, the terms and conditions are not completed therein; number two, it is with respect to a collateral matter * * *

"The Court: I overrule your objection. I am accepting this as to impeach his credibility."

Had the trial court admitted the evidence for purposes of establishing the defendant's intent to defraud, the defendant's attorney could then have challenged the admissibility of such evidence on the ground that it was not sufficiently related to the crime charged either in time, circumstance or place. (*People* v. *Molineux,* 168 N. Y., *supra,* p. 300.) Defendant's attorney was not permitted to challenge the tendered documents pursuant to *Molineux* when the court ruled that said documents were admitted solely to impeach credibility. As the majority indicates a "cross-examiner cannot *contradict* a witness' answers concerning collateral matters by producing extrinsic evidence for the *sole purpose* of impeaching credibility" (p. 245). As a result, the Judge erred in his reason for admitting the evidence and by this error precluded the defendant's attorney from contesting the admissibility of this evidence. The subsequent shift in position by the court, at the conclusion of the cross-examination, when it was asserted for the first time that these documents were admitted to prove the defendant's intent as well as to impeach his credibility was ineffective insofar as the defendant's right to a fair and impartial trial is con-

cerned.[1] Moreover, when the defendant's attorney, on redirect examination, asked the defendant specific questions relating to these documents, he was told that the questioning was improper as the issues were collateral. In effect, then, the Judge precluded all efforts by the defendant's attorney to show that these documents did not establish his intent to commit the crime. The rule of *People* v. *Molineux* was itself a departure from the general restriction imposed against the introduction of similar acts. The present decision, it is submitted, goes far beyond the carefully considered and restrictive rules set forth in prior cases. (See, e.g., *People* v. *Molineux,* 168

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[1] The cross-examination of defendant Schwartzman began on page 389 of the trial transcript. The entire cross-examination covered 90 pages. It was not until the defendant had been examined by the prosecutor for 84 of these pages that the Trial Judge first suggested that the documents—then firmly embedded in the record—might be admissible to show the defendant's intent. The majority would require the defendant's attorney to attempt at this stage of the cross-examination to show that the prosecution could not have properly introduced these documents on the issue of intent. Obviously, the burden should fall on the prosecutor to show that these documents which he introduced were admissible under *People* v. *Molineux* (168 N. Y. 264, *supra*) and *People* v. *Dales* (309 N. Y. 97). Instead the prosecutor told the jury in his summation that, "as I recall, his [defendant's] testimony seemed to indicate that in the past he had given chattel mortgages on property he did not own, and that he had given checks to people knowing that the amount of the check was not in the bank; * * * the reason we asked him those questions [was] to establish to you whether or not his testimony is worthy and was worthy of belief." It is indeed a novel doctrine to require the defense counsel, under these circumstances, "to rebut all alleged instances of his [defendant's] other misconduct and to establish any purported lack of relationship between the alleged misconduct and the crime charged."

N. Y. 264, *supra; People* v. *Dales*, 309 N. Y. 97, *supra.*) One can only speculate whether those decisions are this day overruled.

The errors discussed above were further compounded when the District Attorney questioned the defendant in reference to a charge of which he had been acquitted. The totality of circumstances in this case, I feel, precludes us from stating that "the error is harmless beyond a reasonable doubt" (p. 251).

In concluding, I would merely emphasize the following passage from Justice SUTHERLAND'S opinion in *Funk* v. *United States* (290 U. S. 371, 381): "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." The trial procedure employed below prevented the defendant from developing the truth. Accordingly, I would reverse the judgment of conviction and order a new trial.

Judges SCILEPPI, BERGAN and BREITEL concur with Judge JASEN; Judge BURKE dissents and votes to reverse and order a new trial in a separate opinion in which Chief Judge FULD and Judge KEATING concur.

Judgment affirmed.

APPENDIX B

Judgment (Remittitur) of Court of Appeals (As Amended)

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of March, in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

Witness,

The HON. STANLEY H. FULD, Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 6, 1969.

BE IT REMEMBERED, That on the 25th day of November, in the year of our Lord one thousand nine hundred and sixty-eight, Herbert S. Schwartzman, the appellant in this cause, came here unto the Court of Appeals, by Bracken & Sutter, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by William Cahn, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Appendix B

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John Joseph Sutter, of counsel for the appellant, and by Mr. Henry P. DeVine, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Defendant contended that the District Attorney's cross-examination of him and admission of evidence of uncharged crimes denied defendant a fair trial and due process of law in violation of his rights under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals considered this question and held that defendant's constitutional rights were not violated.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Nassau County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Nassau County, before the Judges thereof, according to

the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 6, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in (SEAL) said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

APPENDIX C

Order of Court of Appeals Denying Rehearing and Amending Remittitur

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of April, A.D. 1969.

Present:

HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 483

THE PEOPLE &c.,
Respondent,

vs.

HERBERT S. SCHWARTZMAN,
Appellant.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix C

ORDERED, that the said motion, insofar as it seeks re-argument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Defendant contended that the District Attorney's cross-examination of him and admission of evidence of uncharged crimes denied defendant a fair trial and due process of law in violation of his rights under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals considered this question and held that defendant's constitutional rights were not violated.

AND the County Court of Nassau County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

(ILLEGIBLE)
Deputy Clerk

APPENDIX D

Statutes Involved—New York State Grand Larceny Provisions (Penal Law, §§ 1290, 1290a, 1294, 1295)

§ 1290. LARCENY DEFINED

A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that: 1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; or

Appendix D

4. The purpose for which the owner was induced to part with possession of such property was immoral or unworthy. Added L. 1942, c. 732, § 2; amended L. 1943, c. 224, eff. April 2, 1943.

§ 1290-a. PLEADING AND PROOF

In any prosecution for larceny it shall be sufficient if: 1. The indictment or information charges that the accused, with the intent to deprive or defraud another of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of some person other than the true owner, stole any property of any of the kinds mentioned in section twelve hundred ninety of this article. If, however, the defendant made use of any false or fraudulent representation or pretense in the course of accomplishing, or in aid of, or in facilitating the theft, evidence thereof may not be received at the trial unless the indictment or information alleges such representation or pretence,[1] and it shall be immaterial whether the theft may have been previously donominated common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses or embezzlement. As long as one of the false or fraudulent representations or pretenses alleged be proven, any other related representation or pretense, though not alleged may be given in evidence.

2. The indictment or information as[2] supported by proof of the commission by the accused of any one of the acts that constitute larceny as defined in this article. As amended L. 1950, c. 149, eff. Sept. 1, 1951.

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[1] So in original. Probably should read "pretense".

[2] So in original. Probably should read "is".

Appendix D

§ 1294. GRAND LARCENY IN FIRST DEGREE

A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

1. Property of any value, by taking the same from the person of another in the night time; or,

2. Property of the value of more than twenty-five dollars, by taking the same in the night time from any dwelling-house, vessel, or railway car; or,

3. Property of the value of more than five hundred dollars, in any manner whatever.

§ 1295. GRAND LARCENY IN FIRST DEGREE; HOW PUNISHED

Grand larceny in the first degree is punishable by imprisonment for a term not exceeding ten years.

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IN THE

Supreme Court of the United States

October Term 1969

No. 373

HERBERT S. SCHWARTZMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM CAHN
District Attorney, Nassau County
Attorney for Respondent

HENRY P. DEVINE
Assistant District Attorney
of Counsel

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
The Evidence	2
The Defense	4
The Writ Should Be Disallowed	8
Conclusion	8
Appendix A—Opinion of New York Court of Appeals	1a

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Herbert S. Schwartzman, prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals entered March 6, 1969, reargument denied April 24, 1969.

Opinion Below

The opinion of the Court of Appeals of the State of New York, printed as Exhibit A in the Appendix hereto, is officially reported at 24 N.Y. 2d 241.

There was no opinion written on the trial level or by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

Jurisdiction

The jurisdiction of this Court is apparently sought pursuant to 28 U.S.C. § 1257 (3), it being argued that the petitioner's Fourteenth Amendment rights circumscribed by the due process clause were wrongly interfered with because of the latitude granted the District Attorney by the Trial Judge in cross-examining petitioner regarding prior criminal and immoral acts.

Question Presented

The sole issue raised by the petition has to do with the fairness of a ruling by the Trial Judge that resulted in the cross-examination of the petitioner regarding prior but similar false pretense larcenies and associated frauds approximating that charged in the indictment, both in character and point of time. Documents relating to the prior criminal and immoral conduct of the petitioner were utilized by the Trial District Attorney during the cross-examination of Schwartzman. The dissent below differed with the majority regarding the use of the documents during the cross-examination and their competency as evidence.

The petitioner contends that the tenure of the trial sunk below the minimum requirements of due process, whereas the respondent denies it.

The Evidence

The first witness called on behalf of the prosecution was Roslyn Gladstone who testified she met the defendant for the first time on the morning of September 25, 1964 at the Meadowbrook National Bank branch in Manhasset pursuant to an appointment arranged by her husband, William Gladstone (30-31).

She testified the defendant-appellant, Herbert Schwartman, offered her an invoice on a shipment from his company, Safety Circuit Corporation, of the face value of $1,592 for the discount price of $1,000. She inquired of him, "Is the invoice good? Is it free and clear?" He replied to her, "Yes, it is" and gave her a letter which was on the stationery of Safety Circuit Corporation, dated that day, September 25, 1964 and which reads as follows (33):

> "Dear Mrs. Gladstone:
>
> In consideration of the receipt of $1,000 by check subject to collection, as purchase price, we herewith sell, assign and convey to you unconditionally and irrevocably our account receivable due from the Department of Purchases, Municipal Building, New York City, our invoice No. 1123, dated August 21, 1964 in the amount of $1,592; that invoice is owned free and clear by us. Copy of the invoice is attached herewith.
>
> Safety Circuit Corporation
> By Herbert Schartzman, President."

She proceeded to write out a check which she then cashed at the bank and gave the defendant-appellant one thousand dollars in cash (35). She testified she would not have entered into this deal and given Mr. Schwartzman the one thousand dollars if she had known that the invoice was not free and clear (36). She never collected the money on the invoice (39).

Mrs. Gladstone on cross-examination emphasized the fact that this was not a loan to the defendant, Herbert Schwartzman and that the invoice was not taken by her as security (65). She further testified that on occasion, she has taken advice from her husband but that her husband did not have authority in this transaction to act for her as her agent (68).

The next witness for the People was Lester Balagur who testified he knew the defendant in this case, Herbert

Schwartzman, and had financial dealings with Mr. Schwartzman in August 1964 (114-116).

He testified that on August 21, 1960, he accompanied the defendant when the defendant made a shipment of merchandise from his corporation to the City of New York and the defendant assigned to him an invoice for this shipment as security for a loan which this witness gave to the defendant of $1,400 (120-123).

It was not contested at the trial that this was the same invoice which was subsequently sold to Mrs. Gladstone.

Mr. Balagur testified that his transaction with the defendant-appellant concerning invoice No. 1123 was a secured loan rather than a sale and further that he never collected on the promissory note (132-136).

The next witness called by the People was Detective William I. Coningsby of the Nassau County Police Department who testified that pursuant to the investigation, he had a conversation with the defendant in March of 1965 concerning the underlying transaction herein (201). He testified that Mr. Schwartzman admitted to him that he owed Mrs. Gladstone a thousand dollars which he hadn't paid because he thought Mrs. Gladstone was charging too much interest (203).

Samuel W. Cohen was the next witness for the People (226). He was an employee of the Department of Purchase of the City of New York who was apparently called to testify concerning the official records of the Department of Purchase, but his testimony was of little value since he was not able to testify that his records covered purchases of the New York City Police Department (228).

The Defense

The first witness called by the defense was Carolyn Woodley who testified she worked for Safety Circuit Corporation and its President, Herbert Schwartzman

(249) for approximately one year leaving the defendant-appellant's employ approximately three weeks before the transaction with Mrs. Gladstone (250).

While she was employed at Safety Circuit Corporation in August 1964, she accompanied the defendant at one time to New York City where he met with William Gladstone, a Mr. Albert Martin and a Mr. Merritt. She observed the defendant signing some papers at that meeting, which meeting was not attended by the complainant, Roslyn Gladstone (251-259).

The next defense witness was William Gladstone, the complaining witness' husband (265). He testified that he was an officer of a corporation known as Key To The Fair, Inc. a corporation in which his wife owned stock (266). He further testified that in August 1964, the corporation loaned the defendant-appellant's corporation eight thousand dollars and the defendant-appellant personally guaranteed the loan and gave Key To The Fair, Inc. a chattel mortgage (271-272).

Mr. Gladstone testified that the account receivable was bought by his wife for one thousand dollars and was not assigned to her as collateral security for a loan (290). Mr. Gladstone admitted that he attempted to recover from the defendant-appellant on this account receivable on behalf of his wife, but he further testified that he also sought payment from the City of New York (291).

This witness testified that he contacted his wife on the morning of September 25, 1964 from the defendant's office and arranged the meeting in his wife's bank in Manhasset (306). He testified he was present in the defendant's office when the letter addressed to his wife was dictated, but he further testified that he did not have a check for a thousand dollars with him at that time.

Mr. Gladstone did admit that this transaction started out as a loan but that it was changed to an out and out

sale because the proposed interest on the loan would not be sufficient to justify the risk involved (315).

Most significantly, the witness testified that he had no authority to act on behalf of his wife in this particular transaction (327).

The next witness called by the defense was the defendant-appellant, Herbert Schwartzman (334). He testified he met William Gladstone in August of 1964 at the office of Albert Martin (336); that was when he was negotiating the loan with Key To The Fair Inc. He discussed with Mr. Gladstone at that time the financial condition and assets of Safety Circuit Corporation relative to putting up security for the loan from Key To The Fair Inc. which Mr. Gladstone represented as Vice-President (339).

Mr. Schwartzman admitted on direct examination that he assigned the invoice in question numbered 1123 to Mr. Balagur in that he executed a letter of assignment to that effect (364).

Herbert Schwartzman further admitted that he signed the letter of assignment to Mrs. Gladstone (People's Exhibit 2), but he said that it had been dictated by Mr. Gladstone in the Safety Circuit Office.

He testified that Mr. Gladstone then arranged to meet his wife and they all went to the bank so that they could cash the thousand dollar check (379). He then received a thousand dollars from Mr. Gladstone who had received it from his wife and that was the end of the transaction (380). He never spoke with Mrs. Gladstone besides meeting her and he never handed her the letter he had signed (People's Exhibit 2—380)

The cross-examination of this defendant was largely concerned with an attack on his credibility as a witness and a demonstration of his criminal intent. In this connection he was questioned concerning a transaction with a Florence Goldfarb and a chattel mortgage on a 1962

Cadillac. During the course of the examination Mr. Schwartzman admitted that at the time he signed an affidavit that he owned the Cadillac free and clear that, in fact, he was not the owner but the lessee of the car. He received four thousand dollars in return for that chattel mortgage (398-417).

Mr. Schwartzman was cross-examined on another chattel mortgage on the same 1962 Cadillac which he did not own and for which he got eighteen hundred and fifty dollars by representing that he did own the Cadillac car (418-424).

The prosecutor then cross-examined the defendant on a check given to the Olympic Ski Shop in Manhasset which check for two hundred and sixty-five dollars was not paid.

Mr. Schwartzman was then questioned about other checks he had given to an electrical supply house and a car wash, a fuel oil company and even the head waiter at a local restaurant. On some occasions, the defendant stated, he issued a check intending to stop payment of it (432). In other transactions, he testified, he did not know why the checks had not been paid or else he had no recollection of the transactions (436).

On another occasion, he admitted that he issued a check for seventeen hundred and twenty-five dollars when he knew he did not have that much money in the bank (448).

Mr. Schwartzman was also questioned about several rings which he may or may not have taken title to and paid for (448-451).

He further testified that he gave a series of checks to a Children's Camp which checks never cleared. He also admitted giving a check to an Ed Kraus for thirty-five hundred dollars which check he never intended to be paid (464-465).

Along with all these other transactions, the defendant was asked on cross-examination about a hundred dollar

check given to a Charles Mendel in May of 1964. The question was posed to the defendant as to whether he recollected that check. His answer was unresponsive in that after he said, "Yes" he then volunteered the statement that "The Judge threw that out in the Courtroom" (467-468).

At no time had Mr. Schwartzman been asked by the prosecutor whether he had done anything improper in connection with that check to Mr. Mendel, but nevertheless Mr. Schwartzman's attorney at that point moved for a mistrial, which motion was denied (468).

The Writ Should Be Disallowed.

There are no compelling reasons for granting the writ because the New York State Court of Appeals did not decide a federal constitutional question heretofore undetermined by this Court. Moreover, the Court of Appeals has not decided this case in a way probably not in accordance with any prior controlling decision of this Court.

We are relying upon the majority decision in the Court below to support or suggestion that the petitioner was not deprived of due process. As a matter of fact, if we read the dissent correctly, they do not premise their position upon the Fourteenth Amendment.

CONCLUSION

The Writ Should Be Denied

Respectfully submitted,

WILLIAM CAHN
District Attorney
Attorney for Respondent

HENRY P. DEVINE
Assistant District Attorney
of Counsel

APPENDIX A

Opinion of New York Court of Appeals

PEOPLE *v.* SCHWARTZMAN [24 N Y 2d 241]

Statement of Case

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* HERBERT S. SCHWARTZMAN, Appellant.

Argued November 25, 1968; decided March 6, 1969.

Crimes—evidence—on trial of defendant for selling account receivable that had been previously assigned, cross-examination of defendant as to other criminal acts was relevant to impeach defendant's credibility and court's permitting same was proper exercise of discretion—documents as to five transactions, all but one being admitted, were used; use of documents as to disputed transaction during cross-examination was not improper impeachment on collateral matter since documents were independently admissible on issue of defendant's intention to defraud—permitting evidence of intention to defraud, not on main case, but on cross-examination, was proper exercise of discretion—error to cross-examine defendant as to crime of which he had been acquitted but error was harmless—no exception having been taken to Judge's comment on defendant's right to appeal, alleged error was not saved for review.

1. Defendant, as president of a corporation, was charged with selling an account receivable of the corporation, representing that the receivable was unencumbered when actually it had been previously assigned. Defendant testified in his own behalf that the purchaser's husband acted as her agent and knew of the prior assignment. Defend-

ant was cross-examined as to instances of misconduct involving the issuing of numerous worthless checks, repeated mortgaging of an automobile which he did not own, sale of mortgaged property upon the representation that the property was unencumbered, wrongfully retaining money received as agent in the sale of an automobile, and refusal to return or pay for a valuable ring received from a jeweler on approval. All these transactions were relevant to impeach his credibility as a witness and the inquiry into them was allowed as a proper exercise of the trial court's discretion.

2. Defendant admitted the transaction for which he was indicted but his intention to defraud was in dispute. Documentary evidence was used in cross-examination as to five transactions. Defendant admitted all but one of them—a chattel mortgage of a Cadillac to a named person. As to this one transaction, the use of the copy and original of the chattel mortgage during cross-examination did not constitute improper impeachment on a collateral matter since the documents not only impeached defendant's credibility, but were also independently admissible on the essential issue of defendant's intention to defraud in the crime charged. The jury was therefore properly instructed that they could give this evidence its logical probative weight on the issues of defendant's credibility and intention.

3. While procedural orderliness requires a party to adduce all his proof during his direct case, here the People were confronted with defendant's explanation that the assignee's husband knew of the prior assignment and it was within the discretion of the court to permit the use of documentary evidence relevant to defendant's intention to defraud during cross-examination.

4. It was error for the People to cross-examine defendant with respect to a crime of which defendant had been acquitted. One answer was involved and could not have influenced the result in view of the strong evidence of defendant's guilt. The error was harmless (Code Crim. Pro., § 542).

5. Where defendant made no objection or exception to the Judge's comment upon his right to appeal, and made no request to charge differently, the alleged error was not saved for review.

People v. *Schwartzman*, 30 A D 2d 917, affirmed.

APPEAL, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 8, 1968, affirming a judgment of the County Court of Nassau County (MARTIN M. KOLBRENER, *J.*), rendered upon a verdict convicting defendant of grand larceny in the first degree.

John Joseph Sutter for appellant. I. The cross-examination of defendant by the court and prosecutor exceeded all permissible limitations and denied him both a fair trial and due process of law. (*People* v. *Webster*, 139 N. Y. 73; *People* v. *Sorge*, 301 N. Y. 198; *People* v. *Moore*, 20 A. D. 2d 817; *People* v. *Jones*, 297 N. Y. 459; *People* v. *Brown*, 284 N. Y. 753; *People* v. *Johnston*, 228 N. Y. 332; *People* v. *McCormick*, 303 N. Y. 403; *People* v. *Duncan*, 13 N Y 2d 37; *People* v. *Russell*, 266 N. Y. 147; *People* v. *Zackowitz*, 254 N. Y. 192.) II. The cross-examination of defendant on a crime for which he had been acquitted is prejudicial per se. (*People* v. *Santiago*, 15 N Y 2d 640). III. The cross-examination of defendant by the court was of such a nature as to indicate communicable disbelief of defendant. (*People* v. *Ohanian*, 245 N. Y. 227; *People* v. *Knapper*, 230 App. Div. 487;

People v. *Mendes*, 3 N Y 2d 120; *People* v. *Perry*, 277 N. Y. 460; *People* v. *Farrell*, 7 A D 2d 642; *People* v. *Montanaro*, 272 App. Div. 834; *People* v. *Adler*, 274 App. Div. 820.) IV. The court's charge to the jury concerning the purpose of receiving in evidence proof of other illegal activities was clearly erroneous. (*People* v. *Molineux*, 168 N. Y. 264; *Mayer* v. *People*, 80 N. Y. 364; *People* v. *Katz*, 209 N. Y. 311; *People* v. *De Garmo*, 179 N. Y. 130; *People* v. *Marino*, 271 N. Y. 317; *People* v. *Doty*, 175 N. Y. 164; *People* v. *Malkin*, 250 N. Y. 185). V. The court's charge to the jury concerning defendant's right to appeal is prejudicial vitiates the trial and is a denial of the constitutionally secured right to a trial by jury in a felony prosecution. (*People* v. *Johnson*, 284 N. Y. 182; *People* v. *Lynch*, 284 N. Y. 239; *People* v. *Sherwood*, 271 N. Y. 427; *People* v. *Esposito*, 224 N. Y. 370; *United States* v. *Fiorito*, 300 F. 2d 424; *People* v. *Silverman*, 252 App. Div. 149; *Duncan* v. *Louisiana*, 391 U. S. 145; *People* v. *Bradner*, 107 N. Y. 1; *Cancemi* v. *People*, 18 N. Y. 128; *People* v. *Miles*, 289 N. Y. 360). VI. The totality of the trial coupled with the cumulative effect of prejudicial errors was such as to deny defendant a fair trial and due process of law. (*People* v. *Becker*, 210 N. Y. 274; *People* v. *Wolf*, 183 N. Y. 464; *People* v. *Savvides*, 1 N Y 2d 554; *People* v. *Bai*, 7 N Y 2d 152; *People* v. *Mleczko*, 298 N. Y. 153; *People* v. *Rosenfeld*, 11 N Y 2d 290; *People* v. *Jackson*, 7 N Y 2d 142; *People* v. *Marendi*, 213 N Y 600.)

William Cohn, District Attorney (*Henry P. De Vine* of counsel), for respondent. I. The trial was fair, (*La Beau* v. *People*, 34 N. Y. 223; *People* v. *Ramistella*, 306 N. Y. 379; *Matter of Friedel* v. *Board of Regents of State of N. Y.*, 296 N. Y. 347; *People* v. *Malkin*, 250 N. Y. 185; *People* v. *Sorge*, 301 N. Y. 198; *People* v. *Buchalter*, 289 N. Y. 181; *People* v. *Santiago*, 15 N Y 2d 640; *People* v. *Tait*, 234 App. Div. 433, 259 N. Y. 599; *Sims* v. *Sims*,

75 N. Y. 466). II. The charge was not prejudicial. (*People* v. *McQueen*, 18 N Y 2d 337.)

JASEN, J. This appeal presents a question involving the nature and extent of permissible cross-examination of a criminal defendant concerning crimes which are not charged in the indictment.

Defendant was the president of Safety Circuit Corporation which appears to have been in financial difficulty in 1964. Roslyn Gladstone purchased an account receivable of the corporation from defendant on September 25, 1964 for $1,000. Defendant signed a letter to Mrs. Gladstone representing that the receivable was unencumbered. Actually, defendant had previously assigned this account receivable to one Lester Balagur as security for a loan and Mrs. Gladstone was consequently unable to collect it. Defendant admitted during his direct testimony at trial that the account had been assigned twice. His only defense was that Mrs. Gladstone's husband acted as her agent and knew of the prior assignment. Mr. Gladstone testified for the defense, but denied that he knew of the prior assignment. Defendant was convicted after trial by jury of grand larceny in the the first degree and sentenced to imprisonment for 2½ to 5 years. The Appellate Division unanimously affirmed.

On appeal defendant contends that he was denied a fair trial because he was improperly cross-examined concerning other criminal acts. The record discloses that the cross-examination of defendant was extensive, and that the District Attorney attempted to impeach his credibility by inquiry into some 22 alleged similar instances of misconduct. The allegations of defendant's other misconduct involved numerous worthless checks, repeated mortgaging of a car which he did not own, sale of mortgaged property upon the misrepresentation that the property was unencumbered, wrongfully retaining money received

as agent in the sale of a car, and refusal to return or pay for a valuable ring received from a jeweler on approval.

The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge (*Langley* v. *Wadsworth,* 99 N. Y. 61, 63.) It is well settled that a defendant who chooses to testify may be cross-examined concerning any immoral, vicious, or criminal acts which have a bearing on his credibility as a witness. (*People* v. *Webster,* 139 N. Y. 73; Richardson, Evidence [9th ed.], § 510.) The offenses inquired into on cross-examination to impeach credibility need not be similar to the crime charged, and questions are not rendered improperly merely because of their number provided they have some basis in fact and are asked in good faith. (*People* v. *Sorge,* 301 N.Y. 198, 200; *People* v. *Alamo,* 23 N Y 2d 630.) Nor does a negative response by a defendant preclude further inquiry by the prosecutor in a legitimate effort to cause the defendant to change his testimony. Otherwise, a "witness would have it within his power to render futile most cross-examination." (*People* v. *Sorge, supra,* p. 201.)

All of the transactions concerning which defendant was cross-examined involve allegations of obtaining money by worthless checks or by other false representations and were, therefore, relevant to impeach his credibility as a witness. The inquiry into these transactions to impeach defendant's credibility therefore, was within the range of the trial court's discretion.[1] (*People* v. *Sorge, supra,* pp. 201-202; *People* v. *Casey,* 72 N. Y. 393, 398-399.)

---

[1] With the exception of one transaction involving a check issued to one Charles Mendell concerning which defendant was tried and acquitted prior to the instant trial. This incident is discussed at pages and of this opinion.

Appendix A

In addition to cross-examining the defendant as to these numerous previous criminal acts, the District Attorney also used documentary evidence to assist his examination. The use of this documentary evidence during cross-examination, the defendant maintains, constitutes impermissible use of extrinsic evidence on collateral matters.

The general rule is that a cross-examiner cannot *contradict* a witness' answers concerning collateral matters by producing extrinsic evidence for the *sole purpose* of impeaching credibility. (*People* v. *Sorge, supra,* p. 201; *People* v. *McCormick,* 303 N. Y. 403; *People* v. *Duncan,* 13 N Y 2d 37; *People* v. *Perry,* 277 N. Y. 460; *People* v. *Malkin,* 250 N. Y. 185; Richardson, evidence, *supra,* §§ 503, 510.) However, an exception to this rule exists where the evidence sought to be introduced is relevant to some issue in the case *other than* credibility or if independently admissible to impeach the witness. (3 Wigmore, Evidence [3d ed.], §§ 1003, 1004, 1021; CPLR 4513; *State* v. *Gilmore,* 42 Wn. 2d 624 [1953]; *People* v. *Clark,* 63 Cal. 2d 503, 505; *Hanover Ins. Co.* v. *Johnson,* 397 S. W. 2d 904 [Texas, 1965]; *Commonwealth* v. *Heller,* 369 Pa. 457, 463 [evidence of other offenses tending to prove motive can be used to contradict a defendant's answers on cross-examination]; 3 Wharton's Criminal Evidence [11th ed., 1935], § 1293; 98 C. J. S., Witnesses, § 633; cf. *Attorney-General* v. *Hitchcock,* 1 Exch. 91, 99; cf. Richardson, Evidence, *supra,* § 503; cf. comment, Use of Bad Character and Prior Convictions to Impeach a Defendant-Witness, 34 Fordham L. Rev. 107, 111-112 [1965]; cf. *United States* v. *Herr,* 338 F. 2d 607, 611 [7th Cir., 1964], cert. den. 382 U. S. 999). The reason for this exception to the collateral evidence rule is evident from the policy considerations underlying the general rule. The collateral evidence rule is said to rest upon auxiliary policy considerations of preventing undue confusion of issues and unfair surprise

by extrinsic testimony. (3 Wigmore, *supra,* §§ 979, 1002.) Also, testimonial errors concerning distant and unconnected points are of inferior probative value.

However, the objection of confusion of issues is inapplicable if the evidence sought to be introduced is admissible for any purpose other than contradiction. Likewise, it is not unfair to expect a party to refute testimonial errors when the subject of the error is a material issue in the case, for upon such subjects the parties should in any event come prepared. Therefore, the policy objections to the contradiction of a witness' answers are inapplicable if evidence of the fact contradicted would be admissible for any purpose independent of the contradiction. It follows that a fact is not a collateral matter if it could be shown in evidence for any purpose independent of the contradiction. (*State* v. *Gilmore, supra; People* v. *Clark, supra; United States* v. *Herr, supra;* 3 Wigmore, *supra,* §§ 1003, 1004, 1021.)

Thus, when a witness testifies concerning a fact material to the case, he may be contradicted either by cross-examination or by introduction of other evidence. (*Wells* v. *Kelsey,* 37 N. Y. 143; *Hynes* v. *McDermott,* 82 N. Y. 42, 52; *Becker* v. *Koch,* 104 N. Y. 394; *Carlisle* v. *Norris,* 215 N. Y. 400, 410; 1 Mottla, New York Evidence, Proof of Cases, [2d ed., 1966], § 431; 3 Wigmore, *supra,* §§ 1003, 1004, 1021; 3 Wharton's Criminal Evidence, *supra,* § 1293; 98 C. J. S., Witness, *supra,* § 633; *People* v. *Gilmore, supra; People* v. *Clark, supra.*) Also, evidence of other crimes has long been held admissible to establish the motive or intention of a defendant. (*People* v. *Molineux,* 168 N. Y. 264; *People* v. *Dales,* 309 N. Y. 97.) It follows that where intention to defraud is an essential element of the crime charged, such as here, evidence competent to establish criminal intention is not a collateral matter with respect to cross-examination. (*State* v. *Gilmore, supra;*

People v. *Clark, supra;* 3 Wigmore, *supra,* §§ 1003, 1004, 1021; *Commonwealth* v. *Heller, supra.*)

The issue, therefore, narrows to whether defendant's answers on cross-examination were contradicted, and, if so, whether the evidence used to impeach his answers was admissible for any purpose independent of the contradiction.

Nine documents relating to seven distinct transactions were utilized in the cross-examination of defendant. Defense counsel did not object to the use of two memoranda relating to defendant's refusal to return or pay for a valuable ring which he received from a jeweler on approval. Documents relating to an assignment of letters patent were also used. Defendant admitted the transaction, but the trial court halted the cross-examination concerning this transaction because the prosecution had failed to prove any wrongdoing.

The transactions to which defendant objected to the use of documentary evidence during cross-examination are five—three instances of defendant's mortgaging a 1962 Cadillac which he did not own and two examples of passing worthless checks. However, a close examination of the record reveals that defendant admitted all but one transaction during cross-examination—that of a chattel mortgage of a 1962 Cadillac to one Florence Goldfarb. Concerning this one transaction, defendant first admitted during cross-examination that he gave the chattel mortgage, and defense counsel stipulated that defendant received $4,000 from Florence Goldfarb for the chattel mortgage when in fact he did not own the car. Defendant then repudiated his counsel's stipulation, stating that he did not obtain $4,000 from Florence Goldfarb, but that the chattel mortgage was to Hy Gold or Hy Goldfarb. At this juncture, defendant basically admitted the transaction, but questioned the identity of the mortgagee. His answers, however, were highly evasive and the prosecutor handed

him a copy of the chattel mortgage. Defendant then admitted that the signature on the mortgage was similar to his own, but denied signing the exhibit. He was shown the original chattel mortgage at the conclusion of his cross-examination, but also denied signing the original document.

As to this one transaction which defendant denied, we conclude that the use of a copy and the original of the chattel mortgage during cross-examination does not constitute improper impeachment on a collateral matter since the documents not only impeached defendant's credibility, but were also *independently* admissible on the essential issue of defendant's intention to defraud in the crime charged.

The rules governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof and the danger of prejudice which it presents to an accused. When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded. "Where, however, it is relevant to negative the existence of accident or mistake, or to show the intent or motive with which the defendant acted, or a common scheme or plan, its probative value is deemed to outweigh the danger of prejudice, and the rules dictating exclusion will yield." (*People* v. *Dales, supra,* p. 101; see also, *People* v. *Molineux, supra,* pp. 291-294; *People* v. *Gaffey,* 182 N.Y. 257; 2 Wigmore, *supra,* §§ 300-307; McCormick, Evidence [1954], § 157.) Evidence of other similar crimes is particularly appropriate where, as in the instant case, the defendant is charged with larceny by false pretenses. (*People* v. *Molineux, supra,* pp. 297-299; *People* v. *Peckens,* 153 N.Y. 576; *Mayer* v. *People,* 80 N.Y. 364.)

In this case defendant admitted obtaining $1,000 from Mrs. Gladstone by assigning an encumbered account re-

ceivable to her. Since he admitted the transaction, his intention is the only fact in dispute. However, the acts involved in assigning the receivable are equivocal, and the underlying intention is not easily inferred from the acts alone. Thus evidence of successive similar misrepresentations by defendant is crucial in attempting to ascertain defendant's intention concerning the crime at bar. (See, e.g., *People* v. *Dales, supra,* p. 101; *People* v. *Molineux, supra,* pp. 297-299; *People* v. *Peckens, supra; Mayer* v. *People, supra.*) In such cases it is recognized that "proof of intent is often obtainable except by evidence of successive repetitions of the act." *People* v. *Molineux, supra,* p. 298.)

Analytically, the problem is one of the similarity of the other misconduct with the crime charged. (*People* v. *Dales, supra,* p. 101; *People* v. *Molineux, supra;* 2 Wigmore, *supra,* § 302; Richardson, *supra,* § 182.) To quote from Professor Wigmore, "Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance." (2 Wigmore, *supra,* § 302, p. 200.)

Here, the evidence of defendant's other misrepresentations is highly relevant on the issue of his intention to defraud in the crime charged and discloses a pattern of obtaining money by false pretenses over a two-year period prior to the crime charged. (Fisch, New York Evidence [1959], § 217; *People* v. *Goldstein,* 295 N.Y. 61, 65; *People* v. *Dales, supra; People* v. *Thompson,* 212 N.Y. 249; *People* v. *Shulman,* 80 N.Y. 373n., 376n. [76 N.Y. 624]; cf. *People* v. *Peckens, supra;* cf. *People* v. *Warder,* 231 App. Div. 215.) There can be no doubt, then, that evidence that defendant mortgaged a 1962 Cadillac which he did not own had an important bearing on the vital issue

of whether the defendant assigned the account receivable with intent to defraud. Accordingly, evidence of this chattel mortgage was admissible on the issue of defendant's intention in respect to the crime charged, and contradiction of defendant's answers concerning this mortgage, therefore, was not a collateral matter.

We conclude, therefore, that the cross-examination of defendant and the introduction of documentary evidence concerning these other crimes was proper.[1] This evidence was relevant to the crucial issue of defendant's intention to defraud, as well as to his credibility. It follows that the jury was properly instructed that they could give this evidence its logical probative weight on the issues of defendant's credibility and intention.

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[1] Although the Trial Judge initially stated that use of documentary evidence during cross-examination of defendant was admissible to impeach his credibility, the court subsequently ruled during the same cross-examination that this evidence was also admissible on the issue of defendant's intention in the crime charged. The People established a sufficient relationship between the crime charged and the alleged other criminal acts to justify admission of this evidence of other crimes on the issue of defendant's intention. Defendant was then presented on redirect examination with the opportunity to rebut all alleged instances of his other misconduct and to establish any purported lack of relationship between the alleged misconduct and the crime charged. The record does not support the dissenters' contention that defense counsel was prevented from exploring the relationship between the alleged other misconduct and the crime charged during redirect examination. To the contrary, defense counsel was afforded wide latitude in asking defendant specific questions on redirect examination to show the circumstances of his other alleged misconduct. The lack of factual support in the record for the dissenters' position is shown by the fact that defendant has not even argued in this court that he was prevented from establishing any purported lack of relationship between the other alleged misconduct and the crime charged because of the trial court's rulings during his redirect examination.

Appendix A

We note that procedural orderliness generally mandates that a party adduce all its proof during its direct case (6 Wigmore, *supra,* § 1873.) This would have been the better practice in the instant case. (Cf. 2 Wigmore, *supra,* § 307.) However, the trial court has broad discretion over the nature and extent of cross-examination (*Langley* v. *Wadsworth,* 99 N. Y. 61, *supra*), including the right to vary the prescribed order of the trial and the normal order of proof. (Code Crim. Pro., § 388; cf. *People* v. *Koerner,* 154 N. Y. 355, 367-369; cf. *People* v. *Seiler,* 246 N. Y. 262.)

Here, the People established a prima facie case of defendant's intention to defraud by evidence that he assigned the same account receivable twice while representing to the second purchaser that the account was free and clear. In defense, the defendant testified that the second assignee (complainant) was chargeable with knowledge that the receivable had been previously assigned. Both the second assignee and her husband denied knowledge of the prior assignment. At this juncture, the People were confronted with a novel and unexpected explanation. The use of documentary evidence relevant to defendant's intention to defraud during cross-examination was within the sound discretion of the trial court under these circumstances. (*Langley* v. *Wadsworth, supra; People* v. *Koerner, supra.*)

The court did, however, permit one clear error. It is settled that reversible error is committed when a prosecutor *with knowledge* of an acquittal cross-examines a defendant concerning the criminal charge on which he has been acquitted. (*People* v. *Santiago,* 15 N Y 2d 640.) This is in keeping with the general rule that knowing use of false evidence or allowing it to remain uncorrected denies due process. (*People* v. *Savvides,* 1 N Y 2d 554; cf. *Napue* v. *Illinois,* 360 U.S. 264, 269.)

The record discloses that defendant was asked near the close of his lengthy cross-examination about a $100 check

which he issued to one Charles Mendell in 1964. Defendant replied, "The Judge threw that out in the courtroom." His attorney's request for a mistrial was denied.

The back of the information pertaining to the Mendell check indicates that the charge was tried in the Nassau County District Court and dismissed at the close of the prosecution's case on February 25, 1965. This dismissal is tantamount to acquittal of the charge after trial, and the cross-examination of defendant concerning this check was, therefore, error. (*People v. Cascone,* 185 N. Y. 317, 334; *People* v. *Santiago, supra.*)

Our decision in *Santiago* (*supra*) is inapposite, however, as here the record discloses that the District Attorney questioned defendant in good faith and in ignorance of his acquittal of the charge involving the Mendell check. Specifically, the District Attorney demonstrated his good faith at trial by showing that "print record" which he had before him was complete to June 4, 1965 and showed that defendant had not been tried since 1963. Defendant's February, 1965 acquittal of the Mendell check charge did not appear on the District Attorney's record. We note that defendant's counsel and the Trial Judge both remarked that they were not accusing the District Attorney of bad faith in regard to the Mendell check.

Logically, the inference the jury might draw from this error was that defendant had been charged concerning the Mendell check and had been acquitted. Certainly, this one answer in itself cannot have influenced the result in this case in view of the strong evidence of defendant's guilt and the proper cross-examination of defendant concerning 21 other similar fraudulent transactions and worthless checks which were more damaging to his credibility. Under these circumstances, the error is harmless beyond a reasonable doubt. (Code Crim. Pro., § 542; see, e.g., *People v. Kingston,* 8 N Y 2d 384; *Chapman* v. *California,* 386 U. S. 18; *Fahy* v. *Connecticut,* 375 U. S. 85.)

Finally, defendant contends that the trial court committed reversible error by commenting upon his right to appeal his conviction. However, there was no objection or exception to that part of the charge and no request was made to charge differently. This alleged error, therefore, is nonreviewable. (Code Crim. Pro., § 420-a; *People* v. *Simons,* 22 N Y 2d 583, 541; *People* v. *Feld,* 305 N. Y. 322, 332.)

Accordingly, the judgment of conviction should be affirmed.

BURKE, J. (dissenting). The record before us in this case discloses incidents at the trial which I regard as so prejudicial to the defendant-appellant's rights as to require a reversal of the judgment of conviction and a new trial.

Herbert Schwartzman stands convicted upon an indictment which charged that, on September 24, 1964, he sold to a Mrs. Gladstone certain accounts receivable of the Safety Circuit Corporation "with the intent to deprive and defraud" her by use of false and fraudulent misrepresentations. He was convicted of larceny in the first degree. At that trial, defendant testified in his own behalf and stated that, when he sold these accounts receivable valued at $1,592 to Mrs. Gladstone for $1,000, she had knowledge of the prior assignment of these accounts.

After testifying in this limited manner, defendant was subjected to an extensive cross-examination. At this time, the prosecutor introduced, over objection, documentary evidence which related to prior bad acts, allegedly committed by the defendant. Defendant contends that this documentary evidence was inadmissible when introduced and that the court's failure to prohibit the admission initially and its refusal to give a proper charge on the evidence at the conclusion of the trial constitute adequate and independent grounds for a reversal in this case.

It is, of course, undisputed that a witness' answers concerning collateral matters cannot be contradicted by the use of extrinsic evidence. It is equally established that documentary evidence is admissible when it relates to a fact material to the prosecution. To this extent, I am in full accord with the majority opinion (pp. 243-246). Until today, it had also been firmly settled that the law drew a distinction between impeaching the credibility of a witness by documentary evidence and establishing an essential element of a crime by the same means. (See, e.g., *People* v. *Malkin*, 250 N. Y. 185, 201.) While the law recognizes such distinctions, courts have been quick to acknowledge that "juries often disregard such distinctions" (250 N. Y., p. 201, *supra*). Nevertheless, the rule had always been that, where evidence is competent when introduced for one purpose and incompetent for another, it is not rendered inadmissible, but will be permitted for the sole purpose for which it is competent. (See, e.g., Richardson, Evidence [9th ed.], § 6; Fisch, New York Evidence [1959], § 16.) Indeed, in analogous situations to the case at bar, it has been continually held that evidence of similar misdeeds is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition. (*United States* v. *Deaten*, 381 F. 2d 114 [2 Cir.]; *United States* v. *Knohl*, 379 F. 2d 427, 439 [2d Cir.]; see, also, *People* v. *Adams*, 21 N Y 2d 397.) In the latter case, this court concluded, in an opinion by Judge Scileppi, that, although the evidence was technically admissible for a limited purpose, the summation of the District Attorney was such as to vitiate whatever protection cautionary instructions would afford.

As I read the majority's opinion, it is their contention that, since the introduction of this documentary evidence might have been relevant to the crucial issue of intent, it thereby became relevant for purposes of impeaching the

defendant's credibility (p. 249). Such a conclusion goes far beyond prior decisions of this court and indeed encroaches upon the well-settled policy of this State that "One may not be convicted of one crime on proof that he probably is guilty because he committed another crime". (*People* v. *Goldstein*, 295 N. Y. 61, 64.) While the majority indisputably possesses the power to change this entrenched and well-reasoned rule, I find that, in their attempt to justify the admissibility of prejudicial evidence in this way, they have seized upon a premise which is in itself defective. I refer to their conclusion that this documentary evidence was relevant—as admitted—to the crucial issue of intent.

While I do not disagree with the majority that evidence of other prior misdeeds is admissible where intent is in issue (*People* v. *Molineux*, 168 N. Y. 264), I cannot ignore the significant limitation which has been imposed by numerous jurisdictions, including New York, that this evidence must refer to events which have reference to the specific charge by reason of the proximity of time, place and circumstance. (*People* v. *Molineux*, 168 N. Y., *supra*, p. 300; see, also, *Patterson* v. *United States*, 361 F. 2d 632 [8th Cir.]; *United States v. Kirkpatrick*, 361 F. 2d 866 [6th Cir.]; *United States* v. *D'Antonio*, 362 F. 2d 151 [7th Cir.]; *Reed* v. *United States*, 364 F. 2d 630 [9th Cir.]; *Pardo* v. *United States*, 369 F. 2d 922 [5th Cir.]; *Boggs* v. *State*, 268 Ala. 358; *Dorsey* v. *State*, 25 Ariz. 139; *Stone* v. *State*, 162 Ark. 154; Richardson, Evidence [9th ed.], §§ 177, 182; Fisch, New York Evidence [1959], § 217; Ann., Evidence—Similar False Pretenses, 78 TALR 2d 1359, 1365-1367, § 2, subd. [b], and cases cited therein.)

In the instant case, each time the defendant's attorney objected to the introduction of the documents referred to by the majority, the trial court overruled him, com-

menting (incorrectly) that the documents were admissible to impeach the defendant's credibility. The following colloquy, concerning a chattel mortgage executed on June 21, 1962 and given to the Franklin National Bank, is illustrative of similar rulings at trial:

> "Mr. Gulney [prosecutor]: I offer it [a copy of the chattel mortgage] in evidence at this time, your Honor.
>
> "The Court: Show it to Mr. Sutter [defendant's trial counsel].
>
> "Mr. Sutter: I object to the introduction of the proposed exhibit on the basis, number one, it is an incomplete document, the terms and conditions are not completed therein; number two, it is with respect to a collateral matter * * *
>
> "The Court: I overrule your objection. I am accepting this as to impeach his credibility."

Had the trial court admitted the evidence for purposes of establishing the defendant's intent to defraud, the defendant's attorney could then have challenged the admissibility of such evidence on the ground that it was not sufciently related to the crime charged either in time, circumstance or place. (*People* v. *Molineux,* 168 N. Y., *supra,* p. 300.) Defendant's attorney was not permitted to challenge the tendered documents pursuant to *Molineux* when the court ruled that said documents were admitted solely to impeach credibility. As the majority indicates a "cross-examiner cannot *contradict* a witness' answers concerning collateral matters by producing extrinsic evidence for the *sole purpose* of impeaching credibility" (p. 245). As a result, the Judge erred in his reason for admitting the evidence and by this error precluded the defendant's attorney from contesting the admissibility of

this evidence. The subsequent shift in position by the court, at the conclusion of the cross-examination, when it was asserted for the first time that these documents were admitted to prove the defendant's intent as well as to impeach his credibility was ineffective insofar as the defendant's right to a fair and impartial trial is concerned.[1] Moreover, when the defendant's attorney, on redirect examination, asked the defendant specific questions relating to these documents, he was told that the questioning was improper as the issues were collateral. In effect, then, the Judge precluded all efforts by the defendant's attorney to show that these documents did not establish his intent to commit the crime. The rule of *People* v. *Molineux* was itself a departure from the gen-

[1] The cross-examination of defendant Schwartzman began on page 389 of the trial transcript. The entire cross-examination covered 90 pages. It was not until the defendant had been examined by the prosecutor for 84 of these pages that the Trial Judge first suggested that the documents—then firmly embedded in the record—might be admissible to show the defendant's intent. The majority would require the defendant's attorney to attempt at this stage of the cross-examintion to show that the prosecution could not have properly introduced these documents on the issue of intent. Obviously, the burden should fall on the prosecutor to show that these documents which he introduced were admissible under *People* v. *Molineux* (168 N. Y. 264, *supra*) and *People* v. *Dales* (309 N. Y. 97). Instead the prosecutor told the jury in his summation that, "as I recall, his [defendant's] testimony seemed to indicate that in the past he had given chattel mortgages on property he did not own, and that he had given checks to people knowing that the amount of the check was not in the bank; * * * the reason we asked him those questions [was] to establish to you whether or not his testimony is worthy and was worthy of belief." It is indeed a novel doctrine to require the defense counsel, under these circumstances, "to rebut all alleged instances of his [defendant's] other misconduct and to establish any purported lack of relationship between the alleged misconduct and the crime charged."

eral restriction imposed against the introduction of similar acts. The present decision, it is submitted, goes far beyond the carefully considered and restrictive rules set forth in prior cases. (See, e.g., *People* v. *Molineux,* 168 N. Y. 264, *supra; People* v. *Dales,* 309 N. Y. 97, *supra.*) One can only speculate whether those decisions are this day overruled.

The errors discussed above were further compounded when the District Attorney questioned the defendant in reference to a charge of which he had been acquitted. The totality of circumstances in this case, I feel, precludes us from stating that "the error is harmless beyond a reasonable doubt" (p. 251).

In concluding, I would merely emphasize the following passage from Justice SUTHERLAND'S opinion in *Funk* v. *United States* (290 U. S. 371, 381): "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." The trial procedure employed below prevented the defendant from developing the truth. Accordingly, I would reverse the judgment of conviction and order a new trial.

Judges SCILEPPI, BERGAN and BREITEL concur with Judge JASEN; Judge BURKE dissents and votes to reverse and order a new trial in a separate opinion in which Chief Judge FULD and Judge KEATING concur.

Judgment affirmed.